RECENT CASES

ACTIONS—CONTRACT OR TORT—QUASI CONTRACT—In Stanton v. Phila. & Reading Ry. Co., 236 Pa. 419 (1912), it was held that assumpsit was the proper action where there was an allegation of a breach of an agreement on the part of the carrier to use reasonable care to preserve the plaintiff's shipment, although the breach was due to negligence; that the doctrine of waiver of tort was not involved.

It is a general principle that where a breach of a contract, express or implied, amounts to a tort a party may sue for breach of the contract or sue for the tort. *Ex contractu* actions: Reilly v. White, 234 Pa. 115 (1912); Carland v. Western Union Teleg. Co., 118 Mich. 369 (1898). *Ex delicto* actions: Eckert v. Penna. R. R., 211 Pa. 267 (1905); Stock v. Boston, 149 Mass. 410 (1889). Where there is no legal duty except that arising from a contract, there can not be an election between an action on contract and one in tort, for there is no tort; in such case there can be no action except upon the contract. Parill v. Cleveland etc. R. Co., 23 Ind. App. 638, 648 (1899). Galveston Ry. Co. v. Hennegan, 33 Tex. Civ. App. 314 (1903), held that, for failure of employer to furnish medical attendance to employee as he had agreed, the action must be *ex contractu* for there was no legal duty extrinsic to the contract; the court also pointed out that if the medical treatment had been undertaken the law would impose a duty to use reasonable care, for breach of which an action *ex delicto* could be maintained.

Where a tort is committed which results in a profit or advantage to the tort feasor, the plaintiff may waive the tort and sue in assumpsit on the fiction of an implied promise. Lamine v. Dorrell, 2 Ld. Ray. 1216 (1705); Norden v. Jones, 33 Wis. 600 (1873); Braithwaite v. Akin, 3 N. D. 365 (1893); Terry v. Munger, 121 N. Y. 161 (1890). A minority of the jurisdictions hold that the tort cannot be waived where the goods converted are merely retained or consumed and not reduced to cash. Bethlehem v. Perseverance Fire Co., 81 Pa. 445 (1876); Woodruff v. Zaban, 133 Ga. 24 (1909); Tuttle v. Campbell, 74 Mich. 652 (1889).

Where one person commits a tort against another without any intention of benefiting his own estate and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay resulting damages. Webster v. Drinkwater, 5 Me. 319 (1828); Tightmeyer v. Mongold, 20 Kan. 90 (1878); Patterson v. Prior, 18 Ind. 440 (1862); Ingersoll v. Moss, 44 Ill. App. 72 (1891).

BILLS AND NOTES—WHAT IS AN INDORSEMENT—In Hendrix v. Banhard Bros., 75 S. E. Rep. 588 (Ga., 1912), it was held that, where the payees in a promissory note payable to order wrote on the back of it the words: "For value received we hereby warrant the makers of the note financially good in execution," and signed their names after such entry, such was an indorsement sufficient to transfer title to the note, and, if made before maturity to a *bona fide* purchaser for value without notice of any defense, such purchaser would be protected from any defenses which the maker might have except those expressly allowed by statute.

This follows the rule already established in that state, Vanzant v. Arnold, 31 Ga. 210 (1860), and is in accord with the prevailing view as early expressed in England, Richards v. Frankum, 9 Car. & P. 221 (1840), and by the majority of decisions in the United States. Partridge v. Davis, 20 Vt. 499 (1848); Burrett v. May, 2 Bailey 1 (S. C., 1830); Williams v. Hagar, 50 Me. 9 (1861); Bissell v. Gowdy, 31 Conn. 47 (1862); Judson v. Gookwin, 37 Ill. 286 (1865); Mullen v. Jones, 102 Minn. 72 (1907); Robinson v. Lair, 31 Iowa 9 (1870); Heard v. Dubuque Co. Bank, 8 Neb. 10 (1878); Donnerberg v. Oppenheimer, 15 Wash.

290 (1896); Kellogg v. Douglas Co. Bank, 58 Kan. 43 (1897); Bank v. McElfish Clay M'f'g. Co., 48 W. Va. 406 (1900); Delsman v. Friedlander, 40 Ore. 33 (1901).

On the other hand, it has been held by the Supreme Court of the United States and some inferior federal courts, and by the courts of two or three states, that any entry of a guaranty, followed by the signature of the payee on the back of a note payable to order, does not amount to such an indorsement as to carry the title and cut off the defenses existing against the paper. Central Trust Co. v. First Nat. Bank, 101 U. S. 68 (1879); Omaha Nat. Bank v. Walker, 5 Fed. 399 (Neb., 1881); Lamourieux v. Hewitt, 5 Wend. 307 (N. Y., 1830); Miller v. Gaston, 2 Hill 188 (N. Y., 1842); Snevily v. Ekel, 1 Watts & S. 203 (Pa., 1841); Edgerly v. Lawson, 176 Mass. 551 (1900). Some of the earlier cases in Massachusetts seem inclined to take the other view. Blakely v. Grant, 6 Mass. 386 (1810); Upham v. Prince, 12 Mass. 14 (1815).

CONTRACTS—INFANT'S LIABILITY—EDUCATION AS A NECESSITY—International Text Book Co. v. Connelly, 99 N. E. Rep. 722 (N. Y., 1912) holds that a course of instruction with a Correspondence School in civil engineering, covering a period of five years, is not a necessary for an infant living with a guardian, able and willing to furnish him with everything suitable and necessary to his position in life.

It is a general proposition, well supported by authority, that a minor cannot bind himself for what are *prima facie* necessaries where his wants are already supplied. Burkhart v. Angerstein, 6 Car. & P. 690 (1833); Johnstone v. Marks, 19 Q. B. D. 509 (1887); Decell v. Lewenthall, 57 Miss. 531 (1879); Trainer v. Trumball, 141 Mass. 530 (1886). Or where he has a parent or guardian able and willing to provide for him. McKanna v. Merry, 61 Ill. 177 (1871); Conbory v. Howe, 59 Conn. 112 (1890); Davis v. Caldwell, 12 Cush. 512 (Mass., 1853). If he have no parent or guardian able to provide for him, he is liable, but even in such cases, the necessaries must be suitable to the circumstances and condition in life of the minor. Walter v. Everard, 2 Q. B. 374 (1891); Jordan v. Coffield, 70 N. C. 110 (1874); Strong v. Foote, 42 Conn. 205 (1875).

The term "necessary" has been held to include a common school education, Middlebury College v. Chandler, 16 Vt. 686 (1844), and a trade, Pardley v. Ship Wendlass Co., 20 R. I. 147 (1897); but it has been held not to include a collegiate or a professional education. Middlebury College v. Chandler, 16 Vt. 683 (1844); Turner v. Gaither, 83 N. C. 357 (1880).

CONTRACTS—REWARDS—PERFORMANCE—A master offered a reward to his servants who would be employed for 4,500 hours in 100 consecutive weeks. The servant signed a written contract for hire which contained no stipulation regarding the reward, and he was discharged one day too soon to earn the reward. *Held*, that it was a question for the jury whether the servant had made a substantial compliance, and when prevented by the offeror or his agent from completing the work, he is entitled to the whole or at least to compensation *quantum meruit*. Zwolanek v. Baker Mfg. Co., 137 N. W. Rep. 769, (Wis., 1912).

In the light of modern social and economic thought, this case is very important for nearly all the large corporations are arranging some scheme of profit-sharing for their servants. And although a case of this exact nature is new, yet it is governed by principles which were laid down in cases of rewards for information, apprehension and conviction of criminals.

A literal compliance by the offeree is not necessary. Besse v. Dyer, 9 Allen, 151 (Mass., 1864); Haskell v. Davidson, 91 Me. 488 (1898). In general, a substantial performance and compliance is sufficient. Gilkey v. Barley, 2 Harr. 359 (Del. 1838); Williams v. R. R., 191 Ill. 610 (1901); Salbadore v. Insurance Co., 22 La. Ann. 338 (1870); Fitch v. Snedaker, 38 N. Y. 248, (1868). Especially so where the offeror has made it impossible for the offeree to complete, Louisville R. R. v. Goodnight, 10 Bush, 552, (Ky. 1874), as in principal case. And although the offeror can make his own stipulations, yet it can be claimed by one who has complied with the terms, according to the true construction of the offer. Comm. v. Edwards, 10 Phila. 215 (Pa., 1874); Peterson v. Mark, 134 Mich. 594 (1903); Wilson v. Stump, 103 Cal. 255, (1894).

CRIMINAL LAW—BURDEN OF PROVING SELF-DEFENSE—In Minnesota, in a case of assault, the trial judge refused defendant's request that the jury be instructed that "no burden of proof rested on defendant to prove that he acted in self-defense; the burden of proof is upon the prosecution to satisfy or convince you beyond a reasonable doubt that the act of the defendant was not self-defense." On appeal, it was held that the instruction requested properly stated the law and it was error to refuse it. State v. McGrath, 138 N. W. Rep. 310 (Minn., 1902). The general rule is that when a person is without fault, is in a place where he has a right to be, and is assaulted, he has a right to defend himself against the threatened or attempted assault. If, therefore, it is shown that in the reasonable exercise of this right he inflicted bodily injury on his assailant, his act is justifiable or excusable. State v. Hays, 23 Mo. 287 (1856). The burden of proving self-defense is the same in assault as in crimes of a higher grade.

There is a conflict of authority as to whether the burden is on the state or the accused. Some cases hold that when the state has established the charge beyond a reasonable doubt and the accused pleads self-defense, the burden is on him to show it by a preponderance of evidence. State v. Yates, 155 N. C. 450 (1911); Turner v. State, 5 Ohio Ar. Ct. R. 537 (1891); Com. v. Colandro, 231 Pa. 343 (1911). But where he has made out his case of self-defense, the burden of proving that he was at fault in bringing about the difficulty has been held to be upon the state. Holmes v. State, 100 Ala. 80 (1893). Other jurisdictions place the burden upon the state to prove beyond a reasonable doubt that a killing was not excusable by reason of self-defense. State v. Sharp, 127 Ia. 526 (1905); Gravely v. State, 38 Neb. 871 (1894); People v. Riordan, 3 N. Y. Suppl. 774 (1888).

CRIMINAL PROCEDURE—INDICTMENT—NEGATIVING EXCEPTION IN STATUTE—A statute of West Virginia prohibits the sale of cocaine except on the prescription of a licensed physician in good standing. In a recent case, under the statute, the Supreme Court quashed an indictment which did not aver that the defendant acted without a prescription. State v. Weir, 76 S. E. Rep. 138 (W. Va., 1912).

It is often a nice question whether an exception in a statute must be negatived in the indictment or whether it simply forms matter of defense, in which case such allegation would be unnecessary. In many cases the position of the exception in the statute has been made the test. Thus it has been held that when exceptions are contained in independent and distinct clauses, it is unnecessary to allege in the indictment that the defendant is not within the exception. State v. Cassady, 52 N. H. 500 (1872); State v. Williams, 20 Ga. 98 (1865); Gratlay v. State, 71 Ala. 344 (1882); Com. v. Shelly, 2 Kulp. 300 (Pa., 1883). And it is generally held that when the exception comes in the enacting clause it must be negatived, but not when it appears in a subsequent clause or statute. U. S. v. Moore, 11 Fed. 248 (1882); Elkins v. State, 13 Ga. 435 (1853); Williams v. State, 20 Ill. App. 92 (1886); State v. George, 93 N. C. 567 (1885); Byrne v. State, 12 Wis. 519 (1860).

Other courts have disregarded the relative position of exceptions in the statute, and have declared that such as form a part of the description of the offense must be negatived wherever they may appear. State v. Miller, 24 Conn. 522 (1856); U. S. v. McCormick, 1 Cranch C. C. 593 (U. S., 1810); People v. Pierce, 11 Hun. 633 (N. Y., 1877); State v. Abbey, 29 Vt. 60 (1856). The real question in each case is as to the nature of the crime intended to be created; that is, a general crime embracing all people for which, however, there may be an excuse like self defense in homicide; or a particular crime only affecting a class, like the sale of liquor by those who have not licenses. It is only in the latter case that negation of the exception is necessary, and in such case it must appear to bring the defendant within the class intended by the statute. Such exceptions properly describe the offense, and nearly always appear in the enacting clause; the courts in most cases, therefore, achieve a common result whether they regard the nature of the act or the formal position in it of an exception.

GAMING—RECOVERY BACK OF MONEY GIVEN FOR ILLEGAL PURPOSE—

Money given to another to place on an election bet, if it has not been so placed may be recovered, as up to that point the transaction is not nullified by the laws against gaming. Klock v. Brown, 137 N. W. Rep. 636 (Mich., 1912).

As a general principle, collateral contracts in the promotion of gambling are affected by their illegal purpose and are rendered incapable of enforcement, as in Badgly v. Beale, 3 Watts, 263 (Pa., 1834), which decided a billiard marker could not at law recover his wages because the nature of the business was unlawful and "a contract growing out of a transaction whose known tendency was to encourage a breach of laws was illegal." In Bates v. Clifford, 22 Minn. 52 (1875), a bet had been made between the buyer and seller of a horse; $500 or $135 was to be its price depending on the result of an election; the court refused to enforce the contract and judicially regarded the transaction as a gift. The vendee of some poker chips was paid by an indorsed check, which he cashed. He was held not a "holder in due course" and the payee was allowed to recover from the bank. Driverall v. Morris State Bank, 88 N. W. Rep. 724 (N. D., 1901).

While a wager is illegal, Wheller v. Spencer, 15 Conn. 28 (1844), the funds held by a stakeholder may be recovered from him by the one who places the bet. In Conklin v. Conway, 18 Pa. 328 (1852), it was found impossible to settle the bet satisfactorily and recovery was allowed; so also in Tribleton v. Baker, 18 Vt. 9 (1873), a loser notified the stakeholder after the result of the election was decided, but before the money had been paid over, not to pay the bet and, the stakeholder paying it, the court held him responsible for the amount. This right to recover is so well recognized that funds in the hands of a stakeholder may be assigned.

On the other hand, when money has been lent another for gambling purposes and so employed, no recovery may be had from the borrower, White v. Bass, 57 Mass. 448 (1849), and the cases which deny a recovery because of speculation are based on this principle. Gibney v. Olivette, 196 Mass. 294 (1907).

HOMICIDE—DISCRETION OF COURT IN ORDERING AUTOPSY—In a murder trial, it was held that if a court has power to order the body of the victim to be disinterred for examination for evidential purposes, it should only be invoked when plainly necessary and essential to the justice and fairness of the trial. Being a matter in the discretion of the court, it may be refused and such refusal, as a rule, is not reviewable as cause for reversal. State v. Highland, 76 S. E. Rep. 140 (W. Va., 1912).

The common law recognized no property in the dead bodies of human beings. Hockenhamer v. Lexington Co., 74 S. W. Rep. 222 (Ky., 1903). Even now it cannot be said that the heir or next of kin has strictly property in the remains; but they have the right of burial, protecting the graves and the like. Though, therefore, it is not regarded as property in the ordinary sense, a corpse is nevertheless, in recognition of the universal sentiment of mankind, protected by the courts. Anderson v. Acheson, 132 Iowa 744 (1907).

There is very little authority on the question discussed in the principal case, as to whether a court has the right to order the disinterment of a corpse for evidential purposes, and that is mostly of an indirect nature. Moss v. State, 152 Ala. 30 (1907); Salesbury v. Com., 79 Ky. 425 (1889). That under certain circumstances, disinterment of corpses for evidential purposes may be ordered in civil actions was held to be the law in Mutual Life Ins. Co. v. Griesa, 156 Fed. 398 (1907). In Gray v. State, 55 Tex. Cr. R. 90 (1908), it was held likewise that the right of relatives of a deceased person to have his corpse remain undistrubed after burial must yield to public interests, and that in a prosecution for homicide the exhumation of the remains of the victim may be ordered, upon the application of the state or the defendant, when it appears to be absolutely essential to the administration of justice. According to another case, however, it seems that the consent of the next of kin is necessary. Moss v. State, 152 Ala. 30 (1907).

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND—STATUTES—The provision—§ 408 Revisal of Code (N. C.)—that a wife may maintain an

action without joinder of her husband (1) when the action concerns her separate property, or (2) when the action is between herself and her husband, is construed in Graves v. Howard, *et al.* 75 S. E. Rep. 998 (N. C., 1912) to confer upon the wife the right to recover upon a mortgage (acquired by gift) held against her husband. This decision accords with those of many jurisdictions which place a liberal construction on the general statutes enacted in derogation of the common law rule refusing a *feme covert* the right to maintain actions at law to secure her separate property and rights. Clough v. Russell, 55 N. H. 279 (1875); *re* Deaner Est., 126 Iowa, 701 (1905); Trayer v. Setzer, 72 Nebr. 845 (1904); Bishop v. Bourgeois, 58 N. J. Eq. 417 (1899). Such statutes are not to be confined to express power. Grube v. Grube, 26 Ore. 363 (1894); Crater v. Crater, 118 Ind. 521 (1888); Wood v. Wood, 83 N. Y. 575 (1881); Wright v. Wright, 54 N. Y. 437 (1873). She may sue upon contractual obligations due her from a firm of which her husband is a member. Kutz's Appeal, 40 Pa. 90 (1861); Benson v. Morgan, 50 Mich. 77 (1883); Matthewson v. Matthewson, Conn. 25 (1906). In equity, Devin v. Devin, 17 How Pr. 514; Adams v. Curtis, 4 Lans. 164 (N. Y., 1870). But *contra*, neither in law nor equity, Edwards v. Stephens, 3 Allen, 315 (Mass., 1862); Clark v. Patterson, 158 Mass. 388 (1893).

Opposed to this current of decisions are those requiring a strict interpretation of such statutes, and opposing any expansion by implication. Kalfus v. Kalfus, 12 Ky. L. Rep. 839 (1891); Crowther v. Crowther, 55 Me. 358 (1867); Webster v. Webster, 58 Me. 139 (1870); Barton v. Barton, 32 Md. 214 (1869); Ritter v. Ritter, 31 Pa. 396 (1858), interpreting the Act of Apr. 11, 1848; Edwards v. Stephens, 3 Allen, 315 (Mass., 1862). To warrant recovery upon a contractual obligation owed by the husband, there is a burden upon a *feme covert* of proving that the consideration given was a part of her separate estate, even though she were authorized to trade as a *feme sole*. Leahy v. Leahy, 97 Ky. 59 (1895); Heacock v. Heacock, 108 Iowa, 540 (1899).

INSURANCE—PRINCIPAL AND AGENT—ILLEGAL CONTRACT—Where a life insurance company issues policies, in which the applicants state that all representations and agreements are reduced to writing therein, they are not bound by an agreement made by the agent without the knowledge or authority of the company to return the premiums and cancel the policies, if a mortgage loan for a large amount is not made by the company to the applicants within thirty days from the date of the agreement. Reed v. Phila. Life Ins. Co., 50 Pa. Sup. 384 (1912). The company refused the loan and the insured sued for the premiums paid. The court denied recovery on three grounds: (1) such agreement was not referred to in the application; (2) was not within the authority of the agent to make; (3) violation of the Act of May 3, 1909, P. L. 405, which forbids rebates of premiums and the making of any agreement as to life insurance other than is plainly expressed in the policy.

Though the company is liable for any acts of the agent which are within the general scope of his apparent authority, National Mut. Fire Insur. Co. v. Barns, 41 Kan. 161 (1889); Rivara v. Insur. Co., 62 Miss. 721 (1885), they are not bound when the agent waives the provisions of a policy in a matter outside the scope of his agency. Insur. Co. v. Dunham, 117 Pa. 460 (1888); Kyte v. Commercial Union Assur. Co., 144 Mass. 43 (1887).

Such agreements as are inconsistent with the terms of the original written contract are not binding upon the company, Ridgeway Co. v. Cement Co., 221 Pa. 160 (1908); and where the relation of principal and agent exists, before an unauthorized act of the agent can be said to be ratified by the principal, he must have full knowledge of all the material facts and circumstances attending the transaction. Daley v. Iselin, 218 Pa. 515 (1907); R. R. v. Gazzam, 32 Pa. 340 (1858). Thus the principal can not be held when it is shown the agent was guilty of an act not within the scope of his employment nor within any of his implied powers. Greene v. Insur. Co., 91 Pa. 387 (1879). But even where the act of the agent is one in which the principal is bound, the law will not lend its support to a claim founded on its own violation. Coppell v. Hall, 7 Wallace, 542 (1868). If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. Thomas v. Brody, 10 Barr, 164 (1848). Generally the test is whether the plaintiff requires the illegal transaction

to establish his case. Holt v. Green, 73 Pa. 198 (1873). The acts of the agent in the principal case were, in the opinion of the court, undoubtedly a violation of the state statute, *supra*, though in a lower court decision, Spangler Brewing Co. v. Ins. Co., 58 Pitts. L. J. 313 (1910), similar transactions were not considered in the light of rebates.

JURY—JUDICIAL OATH BY UNBELIEVER—A juror stated that he believed in a Supreme Power, did not believe in future rewards or punishments, had no fear of personal punishment and did not believe in either the Old or New Testament. After making such statement, he took the usual oath and qualified as a juror despite the defendant's challenge for cause. On appeal, it was held that he was not disqualified from serving as a juror. State v. Jackson, 137 N. W. Rep. 1034 (Iowa, 1912). The court in discussing the objections to the juror said, "He possessed all statutory qualifications and was not subject to challenge for cause (on account of his statements). He took the oath without objection, evidencing the fact that he regarded it as binding on his conscience. Under modern rules oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences. If not objected to or protested as to form, it will be assumed that the person taking it regards it as binding on his conscience in the absence of proof to the contrary."

There is apparently no absolutely clear decision as to whether one is disqualified to serve by want of religious belief. But it has been held that even if this is ground for disqualification, it is not available after trial. McClure v. State, 1 Yerg. 206 (Tenn., 1829). It was also held proper to exclude one who had grossly misbehaved himself as juror in another case and who was destitute of any religious belief. McFadden v. Com., 23 Pa. 12 (1853). Where a statute required that jurors should be electors and provided that electors must not belong to any organization teaching bigamy or polygamy, a Morman was held not to be a competent juror. Territory v. Evans, 2 Idaho 627 (1890).

LIMITATIONS OF ACTIONS—ALIENATION OF AFFECTIONS—In an action by the husband for criminal conversations and alienation of wife's affections, the defendant, *inter alia*, pleaded the statute of limitations.

1. Section 2 (Comp. Stat. 3164, 1910) "all actions of trespass for assault . . . . shall be commenced and sued within four years."

2. Section 3 (Comp. Stat. 3164, 1910) "all actions hereafter accruing for injuries to persons . . . . shall be commenced and instituted within two years."

It was held upon demurrer that Section 2 did not apply, as the action for criminal conversation was in effect on action upon the case; nor did Section 3 apply as this action was clearly not an injury to the person, but to the relative rights of the individual, and "injury to the person" is not equivalent to "injury to the personal rights," therefore it is not barred until six years. Crane v. Ketchem, 84 Atl. Rep. 1052 (N. J., 1912).

The rule now is, as opposed to the old common law rule, that the action of criminal conversation is an action on the case. Sanborn v. Neilson, 5 N. H. 314 (1830); accord, Clough v. Terry, 5 Me. 446 (1828); Van Vacter v. McKelley's, 7 Blkf. 578 (Ind., 1845).

But there is a distinct conflict upon the meaning of the phrase "injury to person," in statutes similar to the above. In Hutchenson v. Burden, 113 Ga. 987 (1911), it was held "'injuries to the person,' as understood by the codifiers and within that scheme of classifications adopted in the Code, was not confined to mere physical or bodily injuries, but embraced all actionable injuries to the person himself, as distinguished from his property." Bennett v. Bennett, 116 N. Y. 584 (1889), "injury to the person, within the meaning of the law, includes certain acts which do not involve physical contact with the person injured," as a wife's right to sue for alienation of her husband; acc. Farneman v. Farneman, 90 N. E. Rep. 775 (Ind., 1910); Taylor v. Bliss, 57 Atl. Rep. 939 (R. I., 1904). Criminal conversation is a "personal injury" to husband, Delmater v. Russell, 4 How. Pr. 234 (N. Y. ,1850). Blackstone seems to have regarded the alienation as a personal injury, 3 Black. 139. It is analogous to the actions for mental anguish, disappointment, sorrow, etc., resulting from

non delivery of a telegram which are injuries to the person within meaning of a statute, Kelly v. W. Union Tel. Co., 77 Tex. Civ. App. 344, (1897); *contra* W. Union v. Witt, 33 Ky. L. Rep. 685 (1908).

Cases in accord with the principal case are: Clow v. Chapman, 26 L. R. A. 412 (Mo., 1894); Sanborn v. Gale, 26 L. R. A.864 (Mass., 1894). "Personal rights" are not rights of the person. The latter are physical and the former are relative and general and embrace the rights a person may have and the wrongs he may suffer. Duffies v. Duffies, 8 L. R. A. 420 (Wis., 1890). A wife was allowed to sue for the alienation of her husband's affections under a statute giving her redress for injuries to "personal rights," Westlake v. Westlake, 34 Ohio St. 621 (1878); but was denied redress under a statute allowing her to sue for injuries to "the person," Mulford v. Clewell, 21 Ohio 191 (1871). Under a liquor statute allowing a wife to sue for injury "to her person," she was denied recovery for the loss of her husband's society. Calloway v. Laydon, 47 Iowa 456 (1877); acc. Freese v. Quipp, 70 Ill. 496 (1873). Lightwoods in "Time Limit on Actions," p. 192 (Eng., 1909), classes alienation under "Injuries to Private Relations, Husband and Wife" and not under "Wrongs to the Person."

MINES—RIGHT OF THE GRANTEE TO DUMP WASTE ON THE SURFACE—As against the owner of the surface land, the purchaser of minerals thereunder has the right, without express words of grant for that purpose, to go upon the surface and use so much thereof as is strictly necessary to the operation of his estate; this carries with it the right to dump upon the surface the waste taken from the workings under that land. Dewey v. Great Lakes Coal Co., 84 Atl. Rep. 913 (Pa. Super., 1912). This case is confirmatory of a long line of Pennsylvania cases on mineral owner's rights over the land surface. Turner v. Reynolds, 23 Pa. 199 (1854); Tiley v. Moyers, 25 Pa. 397 (1855); Bronson v. Lane, 91 Pa. 153 (1879); Potter v. Rend, 201 Pa. 318 (1902). And in other states: Gordon v. Park, 219 Mo. 600 (1909); Porter v. Mack M'f'g. Co., 65 W. Va. 636 (1909); Marvin v. Brewster Co., 55 N. Y. 538 (1874); Williams v. Gibson, 84 Ala. 228 (1887). The Pennsylvania courts have confirmed the mineral owner's rights in the necessary use of the soil, "even as against the owner of the soil." Turner v. Reynolds, 23 Pa. 199 (1854); Pringle v. Vesta Coal Co., 172 Pa. 438 (1896).

But the use of the surface does not extend, except by express grant, to the bringing out of minerals, and deposit of refuse from adjoining lands. Coal Co. v. Schmisseur, 34 Ill. App. 512 (1890); Rockafellow v. Hanover Coal Co., 12 C. C. R. 241 (Pa., 1892).

MUNICIPAL CORPORATIONS—PERSONAL LIABILITY OF OFFICERS—A city treasurer who, without authority, signed an agreement to hold back, with the contractor's permission, a part of a sum due the contractor for certain municipal work, and to pay it to the contractor's assignee, is not personally liable, to such partial assignee, for failure to do so. For, defendant's duties being statutory, the plaintiff must be held to a knowledge of the fact that the defendant was acting without authority because the act was *ultra vires*. Pittsburg-Buffalo Co. v. Schmidt, 85 Atl. Rep. 20 (Pa., 1912).

The case is in accord with the authorities. The defendant's powers were statutory and therefore clear. If the damage is due to mutual mistake of law as to the officer's powers, he is nowhere liable. Huthsing v. Bourquet, 7 Fed. 833 (1881); Newman v. Sylvester, 42 Ind. 106 (1873); Olifiers v. Belmont, 159 N. Y. 550 (1899). Unless he has clearly assumed personal responsibility. Schloss v. McIntyre, 147 Ala. 557 (1906); Mann v. Richardson, 66 Ill. 481 (1873). But if the injury accrued because of a mistake of fact, which is not known to plaintiff, but which is known or ought to be known to the officer, the latter is liable. McClenticks v. Bryant, 1 Mo. 598 (1820); School Directors v. Miller, 54 Ill. 338 (1870). Such contract in excess of his power renders the officer personally liable. Paulding v. Cooper, 74 N. Y. 619 (1877). The contract is an act in his private capacity for which he is liable. McClenticks v. Bryant, *supra;* Yulee v. Canova, 11 Fla. 9 (1864); State Bank v. Kienberger, 140 Wis. 517 (1909).

And such officers are liable for fraudulent representation of power to contract, in an action on the case. Duncan v. Niles, 32 Ill. 532 (1863). Or for clear abuse of authority. Berwer v. Smith, 171 Fed. 735 (1909). But the agent does not warrant the capacity of the principal to contract. Hall v. Lauderdale, 46 N. Y. 70 (1871).

NEGLIGENCE—RULE OF THE ROAD—Failure of an automobile driver to pass to left of a trolley car going in the same direction, as required by statute (R. L. Mass., C. 54, 62), resulting in injury to a passenger who was alighting on the right hand side from the trolley car, rendered such driver liable as a matter of law for such injury, no contributory negligence appearing. Foster v. Curtis, 99 N. E. Rep. 961 (Mass., 1912).

The purpose of all rules of the road is to protect and to facilitate travel. They are made up of customs, ordinances and statutes. The criterion of liability is due care. They apply in general to all carriages and vehicles using the road. Bicycles, Forte v. Am. Product Co., 195 Pa. 190 (1900); tram or trolley cars, Foster v. Curtis, *supra*, Burton v. Nicholson, (1909) I. K. B. 397 (Eng.), are vehicles within the rule. So a dangerous wheeled machine like a lawnmower. Fahrney v. O'Donell, 107 Ill. App. 608 (1903). Cars on rails cannot deviate from their line in passing other vehicles, but beyond that, must regard the right of other vehicles on or near the tracks. Baldie v. Tacoma R. Co., 52 Wash. 75 (1901). And vehicles not confined by rails must pass trolley cars as they would other vehicles. Foster v. Curtis, *supra;* Burton v. Nicholson, *supra.*

Except when approaching another vehicle, a vehicle is not bound to travel on any particular portion of the road. Brooks v. Hart, 14 N. H. 307 (1843); Smith v. Gardner, 77 Mass. 418 (1858). And even when about to pass another vehicle, to drive upon the wrong side is not negligence as a matter of law. Wood v. Boston Elev. Ry. Co., 188 Mass. 161 (1905); Spofford v. Harlow, 85 Mass. 176 (1861); *contra*, Brooks v. Hart, *supra.* But it is negligence sufficient to bar recovery for injuries in any way attributable thereto. Winter v. Harris, 23 R. I. 47 (1901). The presumption is against the party on the wrong side, Angell v. Lewis, 20 R. I. 391 (1898), unless the proper line of travel is in improper condition, Loyacono v. Jurgers, 50 La. An. 441 (1898), or hidden in deep snow, Smith v. Dygert, 12 Bart. 613 (N. Y., 1852). An ambulance, Kellogg v. Church Foundation, 135 N. Y. App. 839 (1909), and fire apparatus, People v. Mahoney, 65 N. Y. Mise. 449 (1909), in performance of duty, may within reason disregard the law of the road.

A person properly using a highway has a right to presume that other vehicles will observe the law of the road. Angell v. Lewis, *supra;* Foote v. Am. Product Co., *supra;* Curtis v. Foster, *supra.* Unless the circumstances render reliance upon such presumption reckless. Baker v. Pendergast, 32 Ohio 494 (1877).

An exception to the usual rule of the road is that a light vehicle must give way to a heavily laden vehicle. Foote v. Am. Product Co., *supra.*

NUISANCE—INJUNCTION—STATUTORY NUISANCE—In a recent case in North Carolina the Supreme Court refused to enjoin the erection of a sawmill, although such erection was prohibited by a city ordinance, when the plaintiff offered merely speculative and not tangible proof that the mill when built would in fact be a nuisance, and that special injury peculiar to himself would result. Berger v. Smith, 75 S. E. Rep. 1098 (N. C., 1912).

It seems to be well settled that a declaration by municipal ordinance of what shall constitute a nuisance is not absolute, and that the courts will still consider the reasonableness of each particular case. Yates v. Milwaukee, 10 Wall. 497 (U. S., 1870); Rendering Co. v. Behr, 77 Mo. 91 (1887). In the principal case the court, following this principle, looked beyond the fact that the defendant was violating an ordinance, and found that the plaintiff had offered no conclusive proof that his mill would be in fact a nuisance when completed. But if the court had taken the view that the construction of the mill constituted a nuisance *per se* because forbidden by ordinance, or if they believed that it would in fact become a nuisance, the plaintiff must still have failed because he did not show

special injury peculiar to himself and distinct from that suffered by other members of the public. High on Injunctions, 4th Ed. §§ 757 *et seq.;* Spooner v. McConnell, 1 McLean 337 (U. S., 1838); Bigelow v. Hartford Bridge Co., 14 Conn. 565 (1845); Low v. Knowlton, 26 Me. 128 (1846); Hill v. City of New York, 63 Hun. 633 (N. Y., 1893); Peterson v. Navy Yard, 5 Phila. 199 (Pa., 1863). Moreover, it is settled that there must be evidence of more than possible or speculative injury to warrant the issuance of an injunction.

The courts are slow to restrain construction on the prospect of future development into a nuisance. Thornton v. Roll, 118 Ill. 350 (1886); Rhodes v. Dunbar, 57 Pa. 274 (1868); Davis v. Atkins, 35 S. W. Rep. 271 (Ky., 1896); Ellison v. Comms, 58 N. C. 57 (1859); Ross v. Butler, 19 N. J. Eq. (1868); Ramsay v. Riddle, 1 Cranch 399 (U. S. ,1807). In such case the plaintiff's bill may be dismissed without prejudice; if his fears are realized he may still have an action in equity for its abatement, or at law for damages.

PARTNERSHIP—BANKRUPTCY—PARTNER NOT SUBJECT TO BANKRUPTCY—In voluntary bankruptcy proceedings against a firm, where the act of bankruptcy was the act of both members, it was held that, as a partnership is a legal entity, it may be adjudged a bankrupt irrespective of whether or not there has been an adjudication of its members as individuals and that, although one partner could not be adjudicated a bankrupt because he was chiefly engaged in farming, yet his individual estate had to be administered by the trustee of the partnership assets. *In re* Duke & Son, 199 Fed. 199 (1912).

As to adjudication, this case is in accord with the unanimous view of the authorities. The provision of the statute that "a partnership . . . . may be adjudged a bankrupt," has led to the doctrine that, in bankruptcy, a partnership is an entity. *In re* Meyer, 98 Fed. 976 (1899); *In re* Stein, 127 Fed. 547 (1904). Being an entity, a partnership may be adjudged a bankrupt without so adjudging its members individually. *In re* Stokes, 106 Fed. 312 (1901). And all the partners may be adjudged without adjudging the firm a bankrupt. *In re* Mercur, 122 Fed. 324 (1903).

As to administration of assets, the principal case, somewhat hesitatingly follows one of two conflicting lines of decisions. The doctrine of the principa, case was first announced in a *dictum* in *in re* Meyer, *supra*, (C. C. A., 2d Cir.1 1899) and affirmed in *in re* Stokes, *supra;* Dickas v. Barnes, 140 Fed. 849 (C., C. A., 6th Cir., 1905); *in re* Lattimer, 174 Fed. 824 (D. C., 1909); and Francis v. McNeal, 186 Fed. 484 (C. C. A., 3d Cir., 1911). *Cf. in re* Junck, 169 Fed. 481 (1909); and Mills v. Fisher & Co., 159 Fed. 897 (C. C. A., 6th Cir., 1908). These cases hold that, if the firm is adjudged a bankrupt, all the partners, whether adjudicated or not, must deliver over their individual assets to the partnership trustee for administration. These cases are based upon the common law doctrine that a partner is personally liable for all partnership debts. They hold that clause *h* of § 5 of the Act applies to proceedings against the partners as individuals only and not to proceedings against the partnership as an entity.

Opposed to these cases are those reviewed by *in re* Bertenshaw, 157 Fed. 363 (C. C. A., 8th Cir., 1907) which cites *in re* Blair, 99 Fed. 76 (D. C., 1900); *in re* Duguid, 100 Fed. 274 (D. C., 1900); Strauss v. Hooper, 105 Fed. 590 (D. C., 1901); and *in re* Stein, 127 Fed. 547 (C. C. A., 7th Cir., 1904). These cases do not deny the common liability of partners, but assert that nonadjudicated partners can be rendered liable only by suit before, during, or after the bankruptcy proceedings against the firm. See *in re* Everybody's Market, 173 Fed. 492 (D. C., 1908). These cases interpret clause *h* of § 5 to refer not only to proceedings against the partners as individuals, but also to proceedings against the partnership.

A partnership may be involuntarily adjudged a bankrupt although not insolvent, as when it makes an assignment for benefit of creditors. *In re* Meyer, *supra; in re* Bertenshaw, *supra;* West Co. v. Lea, 174 U. S. 594 (1898). Accordingly, Francis v. McNeal, *supra*, attempts to reconcile the decisions by holding that when the partnership is insolvent, the individual estate of all partners, adjudicated or not, must be administered with the partnership estate and by suggesting that when the partnership is solvent, the individual estates need not be administered without adjudication.

The doctrine of the principal case leads to the anomaly that the property of a person exempt from the liability of involuntary adjudication, is in partnership cases liable for all debts and yet such person cannot secure the benefits of the Act—a discharge—unless he files a voluntary petition. 20 Harvard L. R. 389 (1907).

PLEADING—AMENDMENTS AFTER AN APPEAL—In an action to quiet title, a sale on fraudulent representations being alleged, an amendment which sought to introduce certain facts showing fraud of a different character from that alleged in the original pleading was refused on the ground (*inter alia*) that it tended to defeat the judgment and put in issue facts which materially changed the issue. Peterson v. Lincoln County, 138 N. W. Rep. 122 (Neb., 1912).

At common law an amendment to the pleadings might be made at any time up to final judgment, even after verdict and motion in arrest of judgment. Ordioneaux v. Prady, 6 S. & R., 510 (Pa., 1823); State v. Marsh, 134 N. C. 184 (1903). But the right to amend existed only in the trial court, with the appellate court exercising appellate jurisdiction over such right. Accordingly it was always necessary to make the original motion in the trial court, Thom. v. Wilson, 24 Ind. 323 (1865), where it might still be made even after the case had been sent up on appeal, Bronson v. R. R., 11 Ore. 161 (1883). And if error in the pleading was discovered on appeal, the record could be remanded back to the trial court for correction. Briggs v. Rutherford, 94 Minn. 23 (1903). Very generally, by statutory authority, the original motion is permitted in the appellate court, to amend ordinary defects of form and variances in the pleading when the issue between the parties is not materially altered. N. Y. Code Civ. Pro. §§ 721–723. To prevent injustice being done the opposite party, such amendments are allowed only when the matter was clearly an issue on trial, and as fully litigated as though it had been raised by the pleadings. Baker v. Sherman, 73 Vt. 26 (1900).

It is the invariable rule that amendments in the appellate court shall be allowed only in support of a judgment, never to reverse it; Wums v. Shaugnessy, 24 N. Y. Suppl. 271 (1893), and when an omission has been objected to in the trial court and a judgment secured on another point, on appeal the omission may not be corrected to support the judgment—even when the opposite party has been misled. Mitchell v. Miller, 54 N. Y. Suppl. 180 (1898).

PRINCIPAL AND AGENT—PRIVATE INSTRUCTIONS TO SPECIAL AGENT—In entrusting an agent with certificates of shares of stock on which he should raise a loan, a verbal limitation on the agent's authority that the loan raised was to be not less than a certain amount, was not a limitation binding as to third persons who acted on his apparent authority to pledge the shares for any amount. Fry v. Smellie, III K. B. 282 (1912).

The doctrine of the principal case is unquestioned; secret or private limitations to the authority of an agent, though effectual between principal and agent, are of no force in respect to third parties who deal with the agent on his apparent authority. Mitchell v. Sanford, 149 Mo. App. 72 (1910). There is an apparent conflict with a group of cases which hold that he who deals with a special agent or one with limited authority is bound to know the extent of that authority; Swindele v. Latham, 58 S. E. Rep. 1010 (N. C., 1907), or conversely, a special or particular agent acting under a limited authority cannot bind his principal if he exceeds that authority. Norton v. Neviles, 54 N. E. Rep. 537 (Mass., 1899). The conflict is more apparent than real. The special or particular agent is clothed with authority, the extent of which it is possible for third parties to ascertain by exercising reasonable care. The secret instructions and limitations on the agent's authority are often confidential and are not divulged under any condition. They would seem scarcely part of his authority, but a private stipulation between principal and agent, while the real authority must be that given to the agent openly. When one has accredited another as his agent, in determining the liability of the principal the question is not what authority was intended to be given the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given him. Griggs v. Selden, 58 Vt. 561 (1886).

PROPERTY—ESTATES BY ENTIRETY—DIVORCE—When a husband and wife hold real estate as tenants by entireties and an absolute divorce is granted, the husband cannot maintain an action of assumpsit against his divorced wife for rents and profits accruing after divorce. An absolute divorce does not change the nature of such an estate. Hilt v. Hilt, 50 Pa. Superior 455 (1912).

The effect of divorce on estates by entireties is a subject very bare of authorities. The law as to divorce prevented this question from arising in the English cases and but few cases have been reported in this country. While there is some conflict in the decisions, yet the weight of authority is against the Pennsylvania doctrine as laid down in Hilt v. Hilt, *supra*, which follows Alles v. Lyon, 216 Pa. 604 (1907). Lewis' Appeal, 85 Mich. 340 (1891), seems to be the only case in accord with the Pennsylvania cases.

That divorce destroys the unity of husband and wife, and severs such estate, making them thereafter tenants in common, is held in Harrer v. Wallner, 80 Ill. 197 (1875); Russel v. Russell, 122 Mo. 235 (1894); Stelz v. Shreck, 128 N. Y. 263 (1891); Hopson v. Fowlkes, 92 Tenn. 697 (1892); Ames v.Norman, 4 Sneed, 683 (Tenn. 1857); Hayes v. Horton, 46 Oregon, 597 (1905).

Tenancy by entireties is distinctly an anomalous estate which grew up under, and was made necessary by, the ancient common law idea of unity of husband and wife. By statutes this unity has been very greatly modified if not almost entirely destroyed, but this particular sort of estate has not been legislated out of existence.

SALES—DELIVERY—PASSING OF TITLE—A large quantity of logs, having been delivered at the place agreed upon in the contract of sale, to be scaled and marked, were destroyed before the exact quantity could be determined in the manner agreed upon. The purchase price had been fixed at a certain rate per 1,000 feet. It was *held* that the title had passed by the delivery; and the fact that the logs had not been scaled and marked at the time of the fire was immaterial as affecting the question of title. That as between seller and buyer there may be such delivery as will vest the property in the latter, though by the terms of the contract there is something to be done afterwards to ascertain the exact quantity to be paid for at the price fixed by the contract. Fee v. Emporium Lumber Co., 50 Super. Ct. 557 (Pa., 1912).

This is in accord with the decisions on this subject in Pennsylvania. Gonser v. Smith, 115 Pa. 452 (1886); Diehl v. McCormick, 143 Pa. 584 (1890); Scott v. Wells, 6 Watts & S. 357 (1843); and it also expresses the prevailing view, which is that the destruction of goods sold and delivered under a contract of sale providing that the purchase price should be fixed by ascertaining the quantity of the goods sold after their delivery is in no wise material to the right of the seller to recover, though such destruction has made it impossible to ascertain the exact price stipulated for by the contract; such question is to be determined by the passing of title, which is dependent entirely upon the intent of the parties as gathered from the contract and circumstances of the sale. Martineau v. Kitching, L. R. 7 Q. B. 436 (1872); Bond v. Greenwald, 4 Heisk. 453 (Tenn., 1871); Upson v. Holmes, 51 Conn. 500 (1883); Gill v. Benjamin, 64 Wis. 362 (1885); Vehmeyer v. Earl, 22 Ill. App. 522 (1886); Wilson v. Shaver, 3 Ont. L. Rep. 110 (1901); Allen v. Elmore, 121 Iowa 241 (1903).

A few cases may be found which hold that where the contract is to sell by weight, measure or count, and the goods have been destroyed before they have been weighed, measured or counted, the seller cannot recover for goods bargained and sold, even though title has passed. Simmons v. Swift, 5 B. & C. 857 (1826).

Some authorities look upon the question of the transfer of title as largely dependent upon which party to the contract has the duty of ascertaining the quantity of the goods sold. Accordingly the rule is frequently laid down that, where the acts of measurement, counting or weighing by the terms of the trade are to be done by the seller, or by him and the buyer together, and, before this is done, the goods are destroyed, the seller will have to bear the loss though the goods are delivered to the buyer; but if these acts are to be done by the buyer the loss will be his. Crawford v. Smith, 7 Dana 59 (Ky., 1838); King v. Jarman, 35

Ark. 190 (1870); Lingham v. Eggleston, 27 Mich. 324 (1873); Burke v. Shannon, 19 Ky. L. R. 1170 (1897); Semple v. Lumber Co., 115 N. W. Rep. 899 (Iowa, 1908).

TORTS—JOINT TORT-FEASORS—Eckman v. Lehigh & WilkesBarre Coal Co., 237 Pa. Sup. 427 (1912), holds that where several proprietors of coal operations, acting independently, unlawfully dump culm into a stream by which it is washed onto the land of another, they cannot be held liable in a joint action, but each is liable severally for the proportion of the damages he caused, and that only.

When a tort has been committed all who aid or counsel, direct or join in the commission of it are joint tort-feasors, Petrie v. Lamont, Car. & M. 93(1891), but to make persons joint tort-feasors they must have "concurred" in the act complained of. Addison on Torts, page 116. The interpretation of the word "concurred" has led to some conflict of authority as to the correctness of the decision in the principal case. The majority of the decisions support Eckman v. Coal Co., *supra*, and it is submitted that they are right in principle. See in accord Lull v. Fox Improvement Co., 19 Wis. 100 (1865); Blaisdell v. Stevens, 14 Nev. 17 (1879); Miller v. Highland Ditch Co., 87 Cal. 430 (1891); Dyer v. Hutchins, 87 Tenn. 198 (1889); Adams v. Hall, 2 Vt. 9 (1829). Day v.Louisville Coal & Coke Co., 60 W. Va. 27 (1906), is flatly *contra*. Numerous decisions may be found in which the court, in permitting an action against one of the parties, said that the liability was both joint and several. These expressions, however, being in the nature of *obiter dicta*, hardly entitle the cases to be ranked as *contra* to the principal case.

TORTS—SLANDER—PRIVILEGED OCCASION—REPETITION OF STATEMENTS AS EVIDENCE OF MALICE—The defendant, as president of a woman's club, made slanderous statements concerning the plaintiff, another club member, at a meeting called for the purpose of trying to discover the perpetrator of certain thefts, and later repeated the statements at similar meetings. *Held*, that the occasion was privileged and that the repetition of the slander was not evidence bearing on the question of malice. Hayden v. Halsbouch, 84 Atl. Rep. 1087 (R. I., 1912).

The rule applicable to such cases was probably best expressed by Blackburn, J., in Davies v. Snead, L. R. 5 Q. B. 611 (1870), when he said: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication although it contains criminatory matter." This statement was cited with approval by Brett, M. R., in Waller v. Lock, 7 Q. B. D. 621 (1881), a strong case, and forms the basis of innumerable decisions all in accord with the principal case. Knight v. Hall, 43 J. P. 176 (1879); James v. Boston, 2 C. & K. 4 (1845); Stott v. Evans, 3 Times L. R. 693 (1865); Gassett v. Gilbert, 72 Mass. 94 (1856); Jarvis v. Hatheway, 3 Johns. 178 (N. Y., 1808); McKnight v. Hasbrouck, 17 R. I. 70 (1890); Montgomery v. Knox, 23 Fla. 595 (1887); Gatis v. Kilgo, 140 N. C. 106 (1906).

The privilege extends only to communications pertinent to the common interests and necessary in protecting those interests or discharging the duty imposed upon the party making the communication. Sewall v. Catlin, 3 Wend. 291 (N. Y., 1829).

While there would seem to be no doubt of the logical correctness of the second part of the decision in Hayden v. Hasbrouch, *supra*, but few cases are to be found which can be considered legal precedents for it. Shenglemeyer v. Wright, 124 Mich. 230 (1900), is in exact accord; Davis v. Starrett, 97 Me. 574 (1903) seems *contra*. When the occasion upon which the words were repeated is absolutely privileged it is well established that their repetition cannot be used as evidence to show malice at the former speaking. McLaughlin v. Charles, 67 N. Y. Sup. Ct. 242 (1891); Thompson v. McCreary, 194 Pa. 32 (1900).

TRESPASS—INDEPENDENT CONTRACTOR—The plaintiff's husband sold timber rights to the defendant's grantor, reserving certain tracts. The defendant by contract had the timber cut and shipped by another who felled timber on the reserved tracts. First court ruled that the defendant's rights depended upon the contract of sale and could not relieve itself from liability by the defense of act of an independent contractor. *Held*, by a divided court, that there was no

error in the ruling and under a plea of independent contractor the burden is upon defendant to prove all the facts that make him who would otherwise be a mere servant, an independent contractor. Abbott v. Sumter Lumber Co., 76 So. Rep. 146 (S. Car., 1912).

Ordinarily the question whether or not the guilty actor is a servant or an independent contractor is one of fact for the jury, Greenburg v. Western Imp. Ass., 148 Cal. 126 (1905), aff. 204 U. S. 359 (1907); Socker v. Waddell, 98 Md. 43 (1903); Banks v. So. Express Co., 73 S. Car. 211 (1906). But where the relationship depends, as in the principal case, upon the construction of a written contract, the question is for the court, Rodgers v. R. R., 31 S. Car. 378 (1888); or where the evidence is undisputed, it is for the court, Greene v. Soule, 145 Cal. 96 (1904).

And as a general rule, the burden is upon the plaintiff to show the guilty actor to be a servant of the defendant, no matter how hard it may be. Axtell v. R. R., 9 Idaho, 392 (1903). And in this view the principal case may be thought to be extreme. Yet as was said in Slayton v. West End Ry., 174 Mass. 55 (1899), where the defense set up was the non-liability for the torts of an independent contractor, the burden is upon the defendant to prove that the actor was an independent contractor. In the principal case, the actor could only justify his being on the premises by the contract with the defendant, and was, therefore, *prima facie* a servant.

If one cannot relieve himself of a duty imposed by legal obligation, Tarry v. Ashton, 1 Q. B. D. 314 (Eng., 1876); or by statute, Hole v. Ry. Co., 6 H. & N. 488 (Eng., 1861); neither ought one to be allowed to shirk a duty, although negative, imposed by contract, for one cannot accept the benefit of a contract without accepting the burden. Keller v. Ashford, 133 U. S. 610 (1890).

The defendant's remedy, in case he has no bond, is against the actor. Peerless M'f'g Co. v. Bagley, 126 Mich. 225 (1901).

TRIAL—VOLUNTARY NONSUIT—TIME—Upon a trial before a district court judge without a jury, the plaintiff has no right to submit to a voluntary nonsuit after the judge has begun to announce his decision. Wolf v. Fulton Realty Co., 84 Atl. Rep. 1041 (N. J., 1912). This case is closely analogous to the one where the trial judge has directed the jury to render a verdict for the defendant; but the verdict has not in fact been rendered; in this situation the plaintiff has no right to submit to a nonsuit. Dobbins v. Dittmers, 76 N. J. L. 235 (1908).

As to the time in which a plaintiff may suffer a voluntary nonsuit there is a difference of opinion. The common law rule is that the plaintiff may suffer a voluntary nonsuit at any time before the jury have pronounced their verdict, or if the cause be tried by judge alone, at any time before the judge has delivered his judgment. Price v. Parker, 1 Salk. 178 (1696); Easton Bank v. Coryell, 9 Watts & S. 153 (Pa., 1844); Outhwaite v. Hudson, 7 Exch. 380 (1852); Peoples' Bank v. Stewart, 93 N. C. 404 (1885); Helwig v. Hosmer, 73 Mich. 258 (1889); Hoodless v. Winter, 80 Tex. 639 (1891); Jackson v. Merritt, 21 D. C. 276 (1892); Crumley v. Lutz, 180 Pa. 476 (1897).

The rule of the majority of the courts is that a voluntary non-suit can only be suffered before the case is submitted to the jury. Amos v. Sinnott, 5 Ill. 440 (1843); Fowler v. Lawson, 15 Ark. 148 (1854); Adams v. Shephard, 24 Ill. 464 (1860); McClelland v. R. Co., 94 Ind. 276 (1883); Bank v. Lesley, 31 Fla. 56 (1893); Morrisey v. R. Co., 80 Ia. 314 (1890); Bauman v. Whiteley, 57 N. J. L. 487 (1895); McPherson v. Seattle Co., 53 Wash. 358 (1909); Knight v. Ill. Cent. R. Co., 180 Fed. 368 (1910). The New York Code has a provision to the same effect.

Still another rule has been adhered to, especially in the New England states, that the plaintiff may take a non-suit as a matter of right before opening his case to the jury, or to the court, when tried without the intervention of the jury; after the case is opened, and before verdict, leave to become non-suit is within the discretion of the court. Washburn v. Allen, 77 Me. 344 (1885); Benoist v. Murrin, 48 Mo. 48 (1871); U. S. v. Humason, 8 Fed. 71 (1881); Bettis v. Schreiber, 31 Minn. 329 (1883); Carpenter v. N. Y., N. H. R. Co., 184 Mass. 98 (1903).

By Act of April 16, 1903, P. L. 216, in Pa., a non-suit cannot be suffered as a matter of right after a sealed verdict. The court may allow it in its discretion.